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In the Supreme Court of the United States

No. 258.

OCTOBER TERM, 1948.

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE PITTSBURGH STEAMSHIP COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF THE PITTSBURGH STEAMSHIP COMPANY.

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Opinions Below.

The opinion of the Court of Appeals (R. 867-872) is reported in 167 F. (2d) 126. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 854-857) are reported in 69 N. L. R. B. 1395.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 5, 1948 (R. 867). The Board's petition for rehearing was denied (R. 873). The petition for a writ of certiorari was granted on November 8, 1948 (R. 875). The jurisdiction of this Court is invoked under Section 1254 of 28 U. S. C., as codified June 25, 1948, and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

Questions Presented.

1. Did the Court of Appeals have the power to set aside the order of the Petitioner because it was based on a decision which lacked "all semblance of fair judicial determination"?

2. Did the Court of Appeals err in finding, after a careful consideration of the entire record, that the decision upon which the Petitioner's order was based lacked "all semblance of fair judicial determination"?

Statutes Involved.

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151), as amended by the Labor Management Relations Act (61 Stat. 136 and 29 U. S. C. Supp. I, 141), and of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001) are as follows:

National Labor Relations Act, as amended by the Labor Management Relations Act:

Section 8 * * * .

"(c) The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit. * * *

Section 10 * * *

"(f) * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence

on the record considered as a whole shall in like manner be conclusive."

Administrative Procedure Act:

Section 1009. *Judicial review of agency action.*

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review.

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * *

Scope of review.

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * *"

Statement.

In 1944 the Pittsburgh Steamship Company owned and operated a fleet of 73 vessels on the Great Lakes and their connecting and tributary waters (R. 664). These vessels, which were engaged in the carrying of bulk cargoes of iron ore, coal and limestone to and from various ports on the Great Lakes, were manned by approximately 600 licensed officers (Masters, Mates and Engineers) and 2,000 unlicensed seamen (R. 665). Most of the vessels carried a crew of 36 men, of whom eight are licensed and the remainder unlicensed. The unlicensed men, excluding the

galley department, were divided into three "watches" with a licensed employee on deck and in the engine department in charge of each "watch." The Master and Chief Engineer did not stand regular watches.

On December 15, 1943, the Respondent consented that an election be held on its 73 ships to determine whether its 2,000 unlicensed employees should be represented by the National Maritime Union (R. 757). The navigation season on the Great Lakes opened the following April and the election was conducted on the Respondent's ships between June 6th and 17th (R. 802). That gave the Union ten weeks to conduct an aggressive unionizing campaign on board the Respondent's ships, which it allowed the Union to do. The Petitioner admits that the Union had an organizer on each of the 73 ships (Br. p. 5). The election went against the Union.

On July 10, 1945, the Petitioner issued its complaint against the Respondent charging that the Respondent had from on or about December 15, 1943, to on or about June 17, 1944, engaged in a planned and continuous course of anti-Union conduct and had restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, and that one Howard Shartle had been discharged because of Union activities (R. 1-6).

The Respondent, answering the complaint, denied that it had engaged in the unfair labor practices charged and alleged that Shartle was discharged by reason of incompetence (R. 6).

The Petitioner introduced evidence of alleged anti-Union conduct by ten of the licensed personnel on seven ships out of 600 on seventy-three ships. It called seven Union organizers as witnesses. Three of them were salt water seamen who had obtained temporary jobs from the Respondent solely to organize its employees (R. 64, 242, 285).

No evidence whatsoever was tendered of any alleged anti-Union act or conduct by any of the licensed personnel on the other sixty-six ships of the Respondent, although the complaint was not filed until more than a year after the election.

At a meeting attended by all of the Respondent's Masters and Chief Engineers held on March 28 and 29, 1944, before the opening of navigation, Mr. Ferbert, the Respondent's President, instructed them that, in view of the approaching election, they were to be strictly impartial and not to interfere with any Union activities so long as those activities did not interfere with the proper operation and discipline on the vessels (R. 666). He wrote two letters to each of the unlicensed personnel informing them of their rights and their absolute freedom of choice, without the slightest hazard to their employment regardless of their decision, and that "no one must threaten them in this election" (Exhibits 2, 3, R. 743, 744). "There must be no partiality" (Exhibit 5, R. 796).

The Respondent rendered every possible assistance to the Petitioner to conduct a free and fair election on board its ships (R. 757-760). There is not the slightest evidence of any conflicts or misunderstandings whatsoever between the Union and the Respondent, or of any unfair labor practices or anti-Union conduct by the Respondent before.

The Examiner found, among other things, that a few isolated incidents on seven of the Respondent's 73 ships, involving ten of its 600 supervisory employees, were pursuant to a general pattern and course of conduct to coerce and intimidate the unlicensed seamen in their efforts at organization (R. 824); that the letters of the Respondent's President to the unlicensed seamen were coercive and hence an integral part of such conduct (R. 828); that the instructions of the Respondent's President to the licensed personnel did not relieve it of responsibility for the sporadic acts of the few who disobeyed them, because they

were not communicated to the unlicensed personnel (R. 830); that one Shartle was discharged for Union activity (R. 838), and that the Petitioner's witnesses, mostly Union organizers, were all truthful and the Respondent's witnesses, Masters, Mates, Chief Engineers and Assistant Engineers, were all unworthy of belief (R. 810, 813, 815, 816, 819, 821, 822). Shartle was the only seaman out of 2,000, the only organizer out of at least 73, even alleged to have been discharged for Union activity.

The Petitioner adopted the findings of the Examiner and, with one exception, his stated reasons therefor *in toto*. He had held that the Ferbert letters were coercive on their face and hence an integral part of the Respondent's general course of coercive conduct (R. 828). The Petitioner corrected this reviewable error of law and found that the letters were collusive in fact, though not in law, because they were an integral part of otherwise coercive conduct (R. 855).

The Court of Appeals reviewed the findings (R. 868-870), and after "a careful consideration of the record" (R. 871), finally concluded that "With due respect for the rule that the findings of the Board are binding upon us if based upon evidence, it becomes impossible to sustain an order upon the adoption of a trial examiner's report which, upon its face, so clearly bears the imprint of bias and prejudice that it lacks all semblance of fair judicial determination" (R. 872).

The Court below did not expressly pass upon the sufficiency of the evidence, but, among other things, said:

> "The Ferbert letters contain no threats or suggestion of coercion * * *." (R. 869.)
>
> "Moreover, such officers as were charged with having committed unfair labor practices were employed on but 7 of the 73 ships of the Petitioner's fleet, and though they had been instructed by the Petitioner that its attitude toward organization was a neutral one, their

conduct was held to be in pursuance of a general purpose to coerce and intimidate the unlicensed seamen in their efforts at organization, according to a defined pattern." (R. 870.)

The Petitioner and its Examiner studiously ignored the fact that, with willing and indeed partisan witnesses available to it, who could have testified to any coercive acts on each of the 73 ships, it was unable after a year's preparation to produce a scrap of evidence of any incident which could even be magnified into anything suggestive of coercion on the part of 590 of the Respondent's supervisory employees out of 600 or on 66 of its 73 ships.

The Petitioner's brief in this Court considers the case as though the Respondent's fleet consisted of seven ships and its supervisory force of ten employees.

SUMMARY OF ARGUMENT

I. The question for decision is whether the Court of Appeals had the power to set aside the order of the Petitioner because it was based on a decision which lacked "all semblance of fair judicial determination."

It is not the narrow and abstract question argued by the Petitioner, whether the Court had the power to set aside the Petitioner's order solely because of the rulings on the credibility of witnesses.

In fact, those rulings are immaterial to the decisive questions in the case.

Two of those questions were decided by the Court of Appeals in favor of the Respondent, namely, (1) that the Ferbert letters "contain no threats or suggestions of coercion" and (2) that the Respondent's supervisory employees "had been instructed by the Petitioner"—the Respondent here—"that its attitude toward organization was a neutral one" (R. 868, 870).

Each of those decisions was decisive of the case.

The Examiner found that the Ferbert letters were an integral part of the Respondent's general course of collusive conduct, because the letters were collusive.

The Petitioner found that they were collusive, because they were an integral part of such general course of conduct. In short, the Petitioner rejected, as did the Court of Appeals, the Examiner's premise as erroneous, but using his conclusion from a false premise as its own premise, it concluded that after all the Examiner's premise was true.

Such circuitous reasoning might not, if an isolated instance, convict the author of prejudging the cause.

II. The Court of Appeals had the power to set aside the Petitioner's order because it lacked "all semblance of fair judicial determination."

That power is conferred by the National Labor Relations Act and by the Administrative Procedure Act.

It is inherent in the power of judicial review.

The question is not one of personal bias and prejudice, such as will disqualify a judge upon the mere filing of a proper affidavit. Such an affidavit cannot be based on the rulings of the judge, because his errors either of fact or law can be corrected on appeal.

There is no such limitation on the power of judicial review of the errors of fact, either by courts or juries, as is imposed on the power of judicial review of the findings of fact of quasi-judicial tribunals.

Such findings are conclusive unless no reasonable mind, exercising an unprejudiced judgment, could draw such conclusions.

It is imperative for the preservation of our system of administrative law that the fairness of the decisions of administrative tribunals in the exercise of judicial power be subject to the power of judicial review.

III. It appears upon the face of the record that the decision of the Petitioner and its Examiner was prejudged and predetermined.

A uniform pattern and a studied design are manifest to resolve every essential question of fact in support of the complaint regardless of the evidence, to ignore established and controlling facts, to give full credence to all the testimony on the Petitioner's side and to discredit all the testimony on the Respondent's side, even though undisputed.

There were four issues of fact in the case, viz.:

1. Had the Respondent itself, prior to the election, adopted a general pattern and course of coercive conduct against the Union for its 600 supervisory employees to follow?

2. Were the Ferbert letters intended to be coercive and an integral part of such conduct?

3. Were the instructions of the Respondent's President to the supervisory employees intended to govern their conduct?

4. Was Organizer Shartle discharged for Union activity?

Of course, the first was the fundamental issue.

The second and third were each decisive of the first, if resolved in favor of the Respondent.

The fourth was evidentiary.

The President's letters to the unlicensed personnel and his instructions to the licensed personnel were the only acts of the Respondent proved, except, of course, as it might on proper evidence be charged with responsibility for the acts of the licensed personnel. Although it might legally be liable to any one injured by the unauthorized acts of the supervisory employees, if done within the ap-

parent scope of their authority, such acts done in disobedience of its orders were not its acts.

Although it might be inferred that a general course of conduct by its supervisory employees was authorized by it, such an inference cannot be drawn from the exceptional conduct of a few, of which the Respondent had no knowledge.

The implicit obedience to the President's instructions by 590 of the 600 supervisors to whom they were given proved that those instructions were given in good faith and established the general pattern and course of conduct adopted by the Respondent.

A few sporadic and exceptional incidents involving a few supervisors on a few ships and occurring during an aggressive unionizing campaign for ten weeks on shipboard, of which the responsible officials of the Respondent had no knowledge, were wholly insufficient to establish the adoption by the Respondent of a general pattern and course of coercive conduct for its supervisory employees to follow.

Shartle was the only organizer out of at least seventy-three, the only unlicensed seaman out of 2,000, alleged to have been discharged for Union activities.

The Captain and the First Mate, who discharged Shartle, each testified that he did not know that Shartle was a Union organizer until after his discharge and that he was discharged solely for incompetence, which was established beyond any doubt and virtually admitted but excused by the Examiner.

There was nothing but suspicion to contradict that undisputed testimony.

The same uniform pattern and studied design to base conclusions on false premises and untenable reasons were shown in all the rulings on the credibility of witnesses.

The Petitioner's important witnesses were seven Union organizers, three of whom were salt water seamen, who had come from the Coast to obtain jobs on the Respondent's

ships to organize its employees and who quit their jobs voluntarily as soon as the election was over to return to salt water.

They were at least partisan witnesses.

Nine Masters, Mates, Chief Engineers and Assistant Engineers positively denied the acts and statements attributed to them. One Master proved to be too ill to be examined.

No unlicensed seaman claims to have been coerced or intimidated. Only three of the organizers, two of them salt water seamen, even claim that they were limited in any respect as to the time, place or manner of conducting their campaign on shipboard, and the Examiner found that those limitations were unreasonable, only because the Respondent had not promulgated general rules on the subject.

Even if the few incidents relied on occurred just as they were related by partisan witnesses, they were wholly insufficient to establish the adoption by the Respondent of a general pattern and course of coercive conduct for its supervisory employees to follow, especially in the absence of any evidence of the slightest deviation from the instructions given them by the Respondent's President by 590 out of 600 of such employees.

Wherefore, the rulings on the credibility of witnesses have no importance whatsoever except as they were a part of the uniform pattern and studied design to reach a predetermined conclusion regardless of the evidence.

IV. The Petitioner's studied effort on pages 70 to 86 of its brief to show that the Examiner actually made some rulings in favor of the Respondent serves to emphasize the fact that as a practical matter he did rule uniformly in support of a predetermined decision.

Indeed, that effort conforms to the characteristic pattern and design manifested by the findings.

ARGUMENT.

POINT I.

THE QUESTION FOR DECISION IS WHETHER THE COURT OF APPEALS HAD THE POWER TO SET ASIDE THE PETITIONER'S ORDER BECAUSE IT WAS BASED ON A DECISION WHICH LACKED "ALL SEMBLANCE OF FAIR JUDICIAL DETERMINATION."

That was the final conclusion of the Court (R. 872).

The Petitioner discusses the abstract question whether the Court had the power to set aside the Petitioner's order solely because of the rulings on the credibility of witnesses.

The significance of such rulings depends on the facts. In the instant case, they were a part of a uniform pattern and studied design characteristic of all the rulings.

The ultimate conclusion of the Court of Appeals as above was based on the entire record. It said that the Respondent's challenge to the verity of the findings and the validity of the order has led us to "a careful consideration of the record" (R. 871).

In the course of its opinion it stated two facts directly contrary to the findings of the Examiner, viz.:

(1) It said that "The Ferbert letters contain no threats or suggestion of coercion and on their face seem clearly to be within the rights of an employer to express his views" (R. 868).

As shown *infra*, those letters expressly informed the unlicensed seamen of their rights and absolute freedom of choice, without the slightest hazard to their employment, and that no one must threaten them.

(2) It said that the supervisory employees "had been instructed by the Petitioner"—the Respondent here—"that its attitude toward organization was a neutral one" and that, despite that fact, the conduct of said supervisory employees "on but 7 of the 73 ships" of the Respondent's fleet "was held to be in pursuance of a general purpose to

coerce and intimidate the unlicensed seamen in their effort at organization, according to a defined pattern" (R. 870).

Each of those facts disproved the charge, although the Court did not expressly so decide.

It pointed out in some detail how the Examiner had found all of the Petitioner's witnesses, mostly Union organizers, entirely truthful and all of the Respondent's witnesses, Masters, Mates and Engineers, unworthy of belief. (R. 871).

It quoted excerpts from opinions of the Court of Appeals of the Second and Fifth Circuits, as follows (R. 871-2):

> "If an administrative agency ignores all the evidence given by one side in a controversy, and with studied design gives credence to the testimony of the other side, the findings would be arbitrary and not in accord with the legal requirement." *N. L. R. B. v. Sartorious & Co.*, 140 F. (2d) 203, 205 (C. C. A. 2).
>
> "The intermediate report of the trial examiner seems to us more like a trial argument than a judicial deliverance. Every issue without exception he found in favor of the Union. He resolved every conflict in testimony, whether serious or trivial, in favor of the Union. With complete consistency he found every witness for the Union reliable and truthful and every opposing witness, whether the Company's president and supervisors or Independent's adherents, untruthful and unreliable." (*N. L. R. B. v. McGough Bakeries Corp.*, 153 F. (2d) 420, 421 (C. C. A. 5).)

It said that the quoted observations "might be multiplied and apply with remarkable fidelity to the findings in the present case" (R. 872) and in so saying was obviously referring to all of the findings which it finally concluded, lacked "all semblance of fair judicial determination" (id.).

It is rare to find statements in other cases so precisely apposite to the case under consideration. But the unfair

ness in the instant case was manifested by additional reasons, as the Court of Appeals observed.

It is equally rare to find a common pattern and studied design to conform the facts to a preconceived opinion as are manifested by every conclusion of the Examiner in the instant case.

As we shall later show, the Examiner ignored every undisputed fact inconsistent with his findings. He gave complete credence to all of the testimony tendered by the Petitioner and discredited all the testimony tendered by the Respondent, even when undisputed. He resolved every issue in support of the Petitioner's charge, regardless of established facts proving the contrary. He found all of the Petitioner's witnesses wholly reliable and truthful and all of the Respondent's witnesses untruthful and unreliable. He magnified trivial incidents without regard to the setting or the circumstances. He assigned labored, farfetched and untenable reasons for all of his conclusions, which the Petitioner adopted in block, merely correcting one palpable error of law and adding two untenable reasons in support of two conclusions respectively, but without rejecting a single conclusion of fact.

The only exceptions, to which the Petitioner is able to refer in its feeble effort to show that the Examiner was fair, prove the rule. We shall discuss them later. (*infra*, pp. 43-46).

It suffices that upon the whole record the Court of Appeals concluded that the decision lacked "all semblance of fair judicial determination."

POINT II.

THE COURT OF APPEALS HAD THE POWER TO SET ASIDE THE ORDER OF THE PETITIONER ON THE GROUND THAT IT WAS BASED ON A DECISION WHICH SHOWED ON ITS FACE THAT IT LACKED "ALL SEMBLANCE OF FAIR JUDICIAL DETERMINATION."

That power is expressly conferred by Section 10 (f) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, and by Section 1009 (e) of the Administrative Procedure Act, enacted in 1947 (See *ante*, pp. 2-3).

The only limitation imposed on the power of review is that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

That limitation presupposes findings fairly and justly determined, which is the very essence of due process.

The question is one of prejudgment. It is not a question of personal bias or prejudice such as requires a judge to recuse himself on the mere filing of a proper affidavit and the cases cited by the Petitioner on pages 51 to 59 of its brief are wholly inapplicable.

An affidavit of personal bias or prejudice cannot be based on prior rulings, since they can be corrected on appeal. There is no such limitation on the judicial review of decisions of the Court as is imposed on the review of decisions of quasi-judicial tribunals. Errors of fact either by judges or juries can be corrected on appeal, even though there be some evidence in support of them. It is hornbook law that verdicts of a jury evidencing passion, prejudice, or mistake will be set aside.

Surely, the arbitrary findings of administrative tribunals, made in the exercise of judicial power, should not be immune from judicial review, especially since they are conclusive if supported by sufficient evidence to comply with the substantial evidence rule (*N. L. R. B. v. Acme-Evans Co.*, 130 F. (2d) 477, CCA 7).

The cases dealing with that rule, cited on pages 41 to 50 of the Petitioner's brief, are likewise wholly inapplicable.

It is unnecessary to labor the point, since the Congress has expressly commanded reviewing courts to set aside the arbitrary or capricious findings of quasi-judicial tribunals.

The Petitioner seems to contend that, while orders of such tribunals may be set aside for unfairness in procedure (see *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38; *Morgan v. U. S.*, 304 U. S. 1), it violates the substantial evidence rule to set aside such an order because it was based on a decision which appears on the face of the record to lack "all semblance of fair judicial determination."

A decision may be prejudged though there be some support for it in the evidence (*N. L. R. B. v. Phelps*, 136 F. (2d) 562, 563, CCA 5). A fair trial requires not only a fair opportunity to present the evidence but also a decision based on a fair consideration of the evidence adduced. Whether a decision was predetermined or was based on a fair consideration of the evidence must be judged by the decision itself, the reasons assigned for it and the evidence.

The Congress, which enacted the substantial evidence rule, also provided for the judicial review of arbitrary or capricious findings by tribunals, whose findings are conclusive if supported by substantial evidence. It understood the weaknesses of human nature and the danger of prejudgment by tribunals which act, as did the Petitioner, in the multiple capacities of complainant, prosecutor and judge.

The Petitioner says that "Since the decision of the Court below in the instant case is the first instance in which a Court has set aside a Board order on the ground that the one-sidedness of the Board's appraisal of credibility established bias and prejudice and therefore invalidated the order irrespective of the substantiality of the evidence to support it, this Court has never heretofore faced the present issue." (Br. p. 45).

The case does appear to be one of first impression in this Court, but it does not involve the narrow and abstract question of mere credibility of witnesses, as the Petitioner seeks to make out.

Rather, the broad question here is whether the review of prejudged and arbitrary findings is limited by the substantial evidence rule. It is not a question of procedure, or of error, or merely of rulings strongly favoring one side. The merits are usually on one side of every controversy. It is the question of the power of reviewing courts to set aside orders based on manifestly arbitrary and predetermined findings, irrespective of whether they are made by courts or administrative tribunals in the exercise of judicial power. Indeed, the law usually provides a remedy for arbitrary action, though it be administrative.

The same Congress that amended the substantial evidence rule by inserting the phrase "on the record considered as a whole" [Labor Management Relations Act, Section 10(f)] also commanded reviewing courts to set aside arbitrary and capricious findings of quasi judicial tribunals. [Administrative Procedure Act, Section 10(e).]

In anticipation, no doubt, of our reliance on the Administrative Procedure Act, the Petitioner says it was enacted after the decision by the Board. It was enacted a year before the submission of the case to the Court of Appeals and is a remedial statute governing procedure. Its application is not limited to proceedings instituted after the passage of the Act. When a statute has intervened between an initial decision and a review of that decision, on appeal, the statute is binding upon the reviewing tribunal. *Patterson v. Alabama*, 294 U. S. 600; *Young Spring & Wire Corp. v. N. L. R. B.*, 163 F. (2d) 905 (Ct. of Appeals, Dist. of Col.).

Moreover, the power is inherent in the power of judicial review expressly conferred on courts which surely are not required to enforce arbitrary and capricious decisions.

While the question does not appear to have been considered by this Court in any reported decision, the power to set aside orders of quasi-judicial tribunals based on arbitrary and capricious findings has been taken for granted by the Courts of Appeals of the Second, the Fifth, the Eighth and the Ninth Circuits.

N. L. R. B. v. Sartorius & Co., 140 F. (2d) 203 (C. C. A. 2);

Id. v. McGough Bakeries Co., 153 F. (2d) 420 (C. C. A. 5);

Id. v. Laister-Kauffmann Aircraft Co., 144 F. (2d) 9 (C. C. A. 8);

Id. v. Union Pacific Stages, 99 F. (2d) 153 (C. C. A. 9).

Though dicta, as the Petitioner asserts in a note to the above quotation from its brief, the statements referred to reflect the considered opinion of the Courts making them.

In the first case cited, the decision was found to be fair; in the others the Board drew its own conclusions from an independent appraisal of the evidence, and its order was enforced to the extent that it was supported by substantial evidence.

POINT III.

IT APPEARS UPON THE FACE OF THE RECORD THAT THE DECISION OF THE EXAMINER AND THE PETITIONER WAS ARBITRARY AND CAPRICIOUS.

The Petitioner charged and undertook to establish that Respondent had adopted a general course of coercive conduct against the Union. For that purpose, it relied on a few sporadic and casual acts and statements of minor supervisory employees on board a few of its ships during an intensive organizing campaign which it allowed the Union to conduct on all of its ships.

Assuming that every incident relied on occurred just as related by partisan witnesses, though the Masters,

Mates and Engineers involved emphatically denied that the incidents occurred and that the statements were made as related by the Union organizers, it is still necessary to appraise the incidents and determine the responsibility for them in the light of the participants, the locus, and the surrounding circumstances and conditions. These considerations were ignored by the Examiner and the Petitioner.

There is no history in the instant case of Union hostility or unfair labor practices on the part of the Respondent.

A Vice-President of the Union, called as an expert on its policies, testified that there had been no unfair labor practice charges against the Respondent prior to the instant case (R. 697), and that he had been involved in many wage disputes with "various employers on the Great Lakes" (R. 105).

The Respondent was engaged in transporting ore vitally needed for war purposes (R. 697).

The National Maritime Union was actively engaged in an attempt to organize its employees and had filed a petition for an election (R. 697) to which it consented (R. 757).

It is undisputed that the Respondent permitted the Union to carry on its campaign on board its ships during the ten weeks between the opening of navigation on April 1, 1944, and the election, and that it provided the Board with every facility to enable it to conduct a fair and free election.

The Petitioner admits that the Union had an organizer on every ship (Br. p. 5).

It is undenied that, at a meeting of the Masters and Chief Engineers just before the opening of navigation, they were instructed by the Respondent's President, Mr. Ferbert, that, in view of the approaching election, they must maintain "strict impartiality" and that "they were not to interfere with any activities as long as those activities did not interfere with the proper operation and discipline

on the vessels" (R. 666). It is also undenied that Mr. Ferbert wrote a letter to all masters stating that "There must be no partiality." (Exhibit 5, R. 796.)

Mr. Ferbert personally wrote two letters to each unlicensed seaman. In the first he said, among other things:

> "When the Union filed a petition last November with the National Labor Relations Board asking for an election, the Company offered no objections, and consented, believing that it was your right to decide whether or not you wanted representation.
>
> * * * * *
>
> "The Company recognizes the right of each employe to join any union he may select and such membership will not affect his position with the Company. On the other hand the Company feels that it should be made clear to you that it is not necessary to join any labor organization if you do not so choose.
>
> "It is approximately six weeks until the election. During this time you will hear many arguments pro and con by your fellow seamen. Your job however is to make up your own mind as to what is best for you, and to vote according to your own best judgment. It is important that you do vote, for only by every employe casting his ballot may the will of the majority be determined." (R. 743-4.)

Again, five days before the election was to begin, he wrote, among other things:

> "In deciding whether you wish to select the National Maritime Union as your bargaining representative or not, you should make up your mind whether representation by the Union will better serve your needs in your relationship with the Company. You should also consider the various aspects of the Union: its program and its leadership, and should carefully consider whether all of these things will be in your best interest. The past record of this Union and the past record of the Company both should be carefully studied. Questions such as these should be carefully thought about and discussed among you so that your selection may be an intelligent and a wise one. *No one must threaten you*

in this election. It is your privilege to make up your own mind as to how you should vote." (Emphasis supplied.) (R. 744-6.)

The italicized words informed the men that they were not to be threatened, coerced, or intimidated by anyone, either by their supervisors or by the Union. Yet the Examiner found that the instructions to the Masters and Chief Engineers were ineffective because not communicated to the unlicensed seamen (R. 830).

With a year to prepare its case, and with willing and even partisan witnesses available to it from every ship, it was unable to present any evidence of a single incident or utterance unfriendly to the Union on the part of 590 of its 600 supervisors or on 66 of its seventy-three ships.

Only three organizers, Lee, Babin and Weissflog, out of at least 73, even claim that their activities were restricted in any way, and the limitations imposed on them were only found to have been unreasonable because the Respondent had not promulgated general rules on the subject (R. 826).

One organizer, one unlicensed seaman out of two thousand, was alleged to have been discharged for Union activity and he was concededly incompetent.

The other incidents on the other three ships involved were mere inquiries or expressions of personal opinion in casual conversations, mere ship talk.

Twenty-six hundred sailors, licensed and unlicensed, including at least seventy-three Union organizers, lived and worked on the Respondent's seventy-three ships. That there were so few incidents or expressions during an aggressive unionizing campaign, of which the slightest criticism or complaint could be made, can only be accounted for by the implicit observance by all but a very few of the supervisory employees of the instructions that they must be "strictly impartial."

No one claims to have been threatened, intimidated or coerced in any way, except that three Union organizers

were forbidden to solicit men to join the Union when they were on watch or to an extent that caused men to quit their jobs or in certain places on the ship and one was discharged for proven and conceded incompetence.

Two Circuit Courts of Appeals had decided in well considered opinions that the employer and its executive officers could not be held responsible for the sporadic acts and statements of a few minor supervisory employees or be held to have adopted a general course of coercive conduct by reason thereof, but that their expressions must be regarded as their individual views.

Boeing Airplane Co. v. N. L. R. B., 140 F. (2d) 423, 433 (C. C. A. 10);

N. L. R. B. v. Brandeis & Sons, 145 F. (2d) 556, 567 (C. C. A. 8).

Those cases are precisely apposite, except that in the instant case the incidents and conversations relied on were between sailors on shipboard during an aggressive unionizing campaign by the Union preparatory for an election.

Of course, the Examiner had knowledge of those decisions. We shall see how he attempted to avoid their application.

There were four issues:

1. Had the Respondent adopted a designed pattern and general course of coercive conduct to influence the election?

2. Were the Ferbert letters coercive?

3. Were the instructions of Mr. Ferbert to the Masters and Chief Engineers given in good faith?

4. Was the charge that Sharile was discharged for Union activity sustained?

None of those issues depended on the credibility of witnesses except that the undisputed testimony of Captain Murray and First Mate Dobson, that neither knew prior to

his discharge that Shartle was a Union organizer and that he was discharged solely for proven incompetence. (R. 510, 678) was discredited by the Examiner.

But the few sporadic incidents relied on constituted the Petitioner's case. It was necessary not only to find that all occurred as related by the Union organizers but also to magnify them out of all proportion to their real significance and in utter disregard of their setting and the surrounding circumstances.

The Examiner found:

> "From the foregoing it is clear, especially when considered in context with the discriminatory discharge of Howard Shartle discussed below, but also independently thereof, that during the 1944 sailing season, the Respondent, through its agents, engaged in a course of conduct violative of the Act. Although the Respondent's anti-union conduct took a variety of forms, all were integrated, it is found, by a common purpose and plan—to defeat the Union in the election, and, beyond that, to discourage and frustrate the organizational efforts of the Union." (R. 823-4.)

The Court will note that the agents referred to were the supervisory employees. Their conduct was found to be the conduct of the Respondent. The effort to make the most of the alleged wrongful discharge of Shartle and at the same time to cast an anchor to windward, lest it should be held that there was no evidence whatsoever to sustain that charge, is also apparent.

1. The finding that the Respondent had adopted a general course of coercive conduct for its six hundred Supervisors to follow.

a. The fact that willing and at least partisan witnesses were unable to testify to a single act done or word spoken by five hundred ninety out of six hundred supervisors, even suggestive of an unfriendly attitude toward the Union, was completely ignored. The Petitioner treats

the case in its brief as though the Respondent only had seven ships and ten supervisors.

b. Trivial incidents and conversations on shipboard were magnified into coercive acts, although it is obvious that no one thought he was being coerced at the time. "Mere words of interrogation or perfunctory remarks not threatening or intimidating in themselves made by an employer with no anti-union background and not associated as a part of a pattern or course of conduct hostile to unionism or as part of espionage upon employees cannot, standing naked and alone, support a violation of Section 8 (1)." *Sax v. N. L. R. B.*, 171 F. (2d) 769, 773 (C. C. A. 7).

c. Only three Union organizers out of at least seventy-three, Loe, Babin and Weissflog, even claimed that the slightest restraints were imposed on their unionizing activities (R. 826). Those restraints were held to be unreasonable only because the Respondent had not promulgated general rules to govern the conduct of Union organizers and had not forbidden the men to talk when on watch (R. 825-6), although it had instructed its supervisors not to interfere with Union activities, as long as they did not interfere with discipline or the operation of the ships.

The Masters and Chief Engineers had to be the judge of what had that effect. It was not enough that the Respondent permitted the Union to conduct an intensive organizing campaign on its ships for ten weeks and instructed its supervisors not to interfere with it except to maintain discipline and properly operate their ships.

It should have made rules, so the Examiner thought, defining the times when, the places where, and the manner in which the organizing campaign could be conducted. That obviously erroneous view alone vitiates his finding.

d. Casual conversation on shipboard where the crew, the Union organizers, and the supervisory employees lived, mere ship talk and gossip, were found in law to be the

acts of the Respondent, though expressly forbidden by it (R. 830).

e. It was even held that the Respondent was not relieved of responsibility for such acts by its instructions to the licensed personnel, since they were not communicated to the crew (R. 830),—a doubly absurd ruling in view of the fact that the latter were personally informed of their rights and that no one must threaten them.

f. It was even found that the statements and acts "of supervisory employees were in law and effect the action of the Respondent" (R. 730).

No doubt that was intended as an answer to the two well-considered decisions cited *ante* p. 22, although the Examiner did not mention either. It may be assumed for the purposes of the argument that the Respondent was liable to anyone injured by the acts of its agents within the scope of their apparent authority, even though expressly forbidden. But that is a far cry from holding that a few such isolated acts are evidence of a general course of conduct adopted by the Respondent itself.

The general pattern and course of conduct actually followed by 590 out of 600 supervisors conformed to Mr. Ferbert's instructions. The 590, rather than the few, set the pattern and general course of conduct, even if there had been no instructions. The Examiner ignored that controlling fact, as does the Petitioner even now. He had to find that the exceptional conduct of a few subordinate employees, not even executive officers, was in fact the conduct of the Respondent itself, though forbidden by it.

2. The Ferbert Letters.

a. The Examiner made a studied effort to find that the statement that wage rates were in the control of the Government was misleading, though true, and that the statement respecting the Union policy of rotary hiring was a misrepresentation (R. 803-7, 828-830).

b. He ignored the Petitioner's own evidence, the Union contract (Ex. 8, R. 774), which, by Sections 2 and 3 of Article 1, proves that a seaman could not go from one ship to another without losing seniority and that vacancies must be filled from the Union hall. He also ignored the testimony of Vice-President Lawrenson who admitted that a seaman could not follow an officer from one vessel to another (R. 124).

c. He found that the letters were coercive on their face and hence an integral part of the Respondent's general course of coercive conduct.

Anticipating the decision of the Court of Appeals, the Petitioner found that the letters were not unlawful *per se*, but that they were collusive in fact because an integral part of said general coercive conduct (R. 855), which was disproved by the letters if they were not collusive. The Examiner found that the letters were an integral part of the Respondent's general course of coercive conduct because they were themselves coercive. The Petitioner found that they were coercive because an integral part of coercive conduct.

Such circuitous and absurd logic would not be resorted to except to support a predetermined decision.

3. The Instructions of the Respondent to the Masters and Chief Engineers.

a. The Examiner undertook to cast doubt on the positive and undisputed testimony of Industrial Relations Manager Garbett (R. 666), although it was corroborated by the equally positive testimony of Captain Murray (R. 678), of Captain Lawless (R. 484), and of Chief Engineer Heckel (R. 552).

Garbett testified as follows:

> "Mr. Ferbert announced that there would in all probability be an election by a union, or one or more unions, that it would be held in June, that the officers

were to be strictly impartial. They were not to interfere with any activities so long as those activities did not interfere with the proper operation and discipline on the vessels."

Captain Murray testified:

"There were strict orders to take a neutral position with regard to union labor, to in no way to interfere or try to influence anybody unless it interfered with the discipline or operation of the ship. He further stated that a copy of the minutes of the meeting was sent to him which was 'thoroughly read and discussed at a meeting of the engineers and mates on his ship and that he requested them to live up to the instructions.'"

Captain Lawless was asked, on cross-examination, if he had ever had any conversation with the mates about the Union. He replied:

"I gave the mates the instructions prior to the election, the instructions that were given to me, to take no part, no sides, to be impartial." (R. 484.)

Again on cross-examination, in reply to the question, "Why did you think there was a forthcoming election," he said:

"The Pilot has been pointing to that all along and we were informed during the spring meeting in Cleveland that a request for an election had been made and the company was willing for the election to take place and we were instructed to take no sides in this." (R. 475.)

Chief Engineer Heckel was asked also, on cross-examination, by the Examiner, "What was said at the Hotel Hollenden with reference to the 1945 election" (obviously referring to the 1944 election). He replied "That the Union has requested another election." The Examiner asked him if he had finished his answer to which Heckel replied "I can add a little more. The Union had requested another election and they wanted us to be fair, abide by the

rules, that if the election should—whenever it was called, 'show no partiality" (R. 552).

In a letter to the Masters Mr. Ferbert said "there must be no partiality" (R. 796).

Though the Examiner did not venture to hazard a finding contrary to such explicit and undisputed testimony he said that he considered Mr. Garbett's testimony, "dubious, at best, in light of the fact that two ship officers of the respondent who were present at the 1944 meeting could not, while testifying, recall that any such instructions were given" (R. 829).

Neither of the two officers, above mentioned, said that he could not recall "that any such instructions were given." Neither of them was asked about the specific instructions. One of them was asked what was said "relative to the coming election," and finally, in answer to a question of the Examiner "Is it your testimony that nothing was said about the coming election or that you do not recall whether there was or not" the witness said "Well, I never heard any. If there was some, I couldn't say" (R. 632).

The other witness did not recall when he first heard that an election was going to take place. He was not asked about the March meeting (R. 327).

Even a straw tells which way the wind blows. After thus magnifying the want of recollection of witnesses whose memories were not searched with reference to the specific instructions given, the Examiner found, on the assumption that they were given, that they did not relieve the respondent of responsibility because they were not communicated to the unlicensed seamen (R. 830).

b. He ignored the fact that those instructions were so implicitly observed by at least 590 out of 600 supervisors, that not a single complaint or criticism could be made against any of them even by partisan Union organizers.

c. He ignored the fact that the general course of conduct actually followed by all but a few supervisors was

impeccable and that the Petitioner had attempted to prove the adoption by the Respondent of a general course of conduct for all its supervisors to follow by the exceptional conduct of a few.

d. Not a word of criticism or complaint could be made by partisan witnesses in respect of a single act or utterance on sixty-six out of seventy-three ships. That proves an amazing compliance with the instructions given, especially considering the prevailing circumstances and conditions.

e. The instructions alone, as well as the letters, disproved the Petitioner's case. Both had to be disposed of. Each was disposed of on untenable, and even on absurd, grounds.

4. The Discharge of Shartle.

The disposition of that issue can only be accounted for by the fact that it was prejudged. There is not a particle of evidence to support the charge of a wrongful discharge.

a. The Examiner ignored the fact that Shartle himself did not testify to a single act likely to bring his organizing efforts to the attention of the Master or First Mate, as did Lee, Babin and Weissflog, and the further fact that he did not pretend that he had ever had a word with either on the subject of his organizing efforts.

He said that he was warned by a friendly Assistant Engineer to watch his step (R. 171). This was denied by Engineer Sickle who testified that he did not even know that Shartle was an organizer (R. 353, 354).

b. The Examiner ignored the fact that there was no charge that any other Union organizer or any other seaman out of 2,000 was discharged for Union activity and that aggressive organizers like Lee, Babin and Weissflog were not discharged. Yet he found that incompetent and inoffensive Shartle was discharged to intimidate the others.

The Petitioner attempted to break the force of that fact by finding that Shartle's successor as a Union organizer, John Vogel, was also discharged by First Mate Dobson when he learned that he was an organizer, but added a footnote that Vogel's discharge was rescinded because he did not have time to pack his clothes before the boat sailed (R. 855, N. 2).

It did not call attention to the fact that, though Vogel persisted in saying that he was discharged, he admitted that he left the ship voluntarily at the end of the trip and that First Mate Dobson wanted him to remain (R. 224) and the Petitioner now admits that "the Mate relented and wanted him to remain" (Br. p. 13).

Ore boats do not have to sail on the minute or on schedule. When seamen on leave were late in returning to the ship, its departure was delayed to await their arrival. Vogel admitted that there was still an hour after the incident before the ship was due to sail (R. 216).

The First Mate explained the incident—a violent quarrel between Vogel and a seaman who was demanding a receipt for his dues or a return of the money. He unequivocally denied that he discharged Vogel (R. 505). Vogel admitted the nature of the incident (R. 215-6).

Such an incident would not thus have been magnified to support a finding that Shartle was wrongfully discharged, if there had been any evidence of such a discharge.

c. The Examiner's labored effort to assign reasons for rejecting the undisputed testimony of both Captain Murray and First Mate Dobson, that they did not even know that Shartle was a Union organizer when he was discharged, was characteristic of many like efforts to minimize or otherwise dispose of undisputed facts (R. 831-2).

Having been instructed not to take sides, Captain Murray did not concern himself with organizing efforts (R. 690-1) and did not hear "underground talk" (R. 693).

d. The Examiner made a characteristically labored effort to minimize Shartle's conceded incompetence (R. 834-838) and even found that Captain Murray and First Mate Dobson had not properly instructed him because they wanted an excuse to discharge him (R. 838).

e. Although the First Mate gave a long list of Shartle's derelictions, which were corroborated by others, and which satisfied him that Shartle would never become a sailor, wherefore he discharged him at the end of a trip (R. 502), the Examiner even assigned the shortage of seamen on the Lakes as a reason why even a seaman as incompetent as Shartle would not be discharged, for his "shortcomings" (R. 838). The Mate put up with Shartle's incompetence for several weeks while attempting to teach him.

f. Shartle was on Third Mate Hewer's watch while the vessel was navigating. Hewer testified that he was not a trustworthy man to have in the position of watchman; that he was not competent to handle the winches and had no leadership qualities. Hewer reported his impressions to the First Mate (R. 527, 528). Because he could not recall, eighteen months after the event, whether he had recommended that Shartle be discharged the Examiner found, as a fact, that no such recommendation had been made (R. 832).

g. He even found that retention after the discovery of a dereliction condoned it (R. 835). If Shartle had been discharged immediately the Examiner would have condemned the Mate for not giving Shartle a chance. No action which the Respondent took or might have taken would have met with the approval of the Examiner.

h. He minimized the winch incident about which Shartle concededly lied and said that "there is no evidence that at that time the incident was heightened to the importance which is now attached to it by the Respondent" (R. 836, N. 43).

But for the prompt intervention of the Mate, serious injury, if not worse, might have been inflicted on members of the crew (R. 336, 500).

i. The Examiner even characterized Shartle's Union activities as "outstanding" (R. 838).

The foregoing reasons demonstrate beyond the peradventure of a doubt that the decision that Shartle was discharged for Union activity was predetermined.

If that was the reason for his discharge, it was the one really coercive act shown and the Examiner so outdid himself in assigning labored, farfetched and untenable reasons for his decision as to demonstrate that it was based on his own prejudgment rather than a fair consideration of the evidence.

5. The Credibility of Witnesses.

The strained and studied effort to decide every issue in the case in favor of the Petitioner was climaxed by the reasons assigned for giving complete credence to all the testimony of the Union organizers and for rejecting all the testimony of the Masters, Mates, Chief Engineers and Assistant Engineers.

The purpose is manifest. We maintain that even assuming that the few incidents and conversations relied on occurred just as related by the Union organizers, they were insufficient to prove even that a general course of coercive conduct was actually followed by the Respondent's supervisory employees, let alone that such a course of conduct was directed by the Respondent itself. But without that evidence the Petitioner did not have even the semblance of a case.

It was, therefore, imperative that full credence be given to all the testimony on one side and that all the testimony on the other side, even though undisputed, be rejected.

a. The Examiner said that Organizer "Lee by his demeanor and candor impressed the undersigned, as Brinker did not, as a completely credible witness" (R. 810) and that the testimony of "McGuiness, a member of a rival labor organization, called by the Respondent to corroborate Brinker * * * was generally indefinite, contradictory and unreliable" (R. 808, N. 8).

McGuiness was not employed by the Respondent at the time of the trial.

Lee had testified that Captain Brinker had "accused him in vile and abusive language of driving men off the ship because of the Union" (R. 807).

The Examiner ignored the decisive question whether Captain Brinker had good reason for reprimanding Lee for driving men off the ship by his importunities.

Captain Brinker testified that McGuiness and Moore, two firemen, had just told him that they were quitting because "Lee was bothering them for joining the N.M.U. all the time" (R. 417-8).

McGuiness corroborated the Captain (R. 382). There is no denial of that fact; nor is there any denial of the fact that as the two men were returning to the ship an incident occurred involving Lee and that they immediately demanded their pay and left the ship.

Lee testified that they returned to the ship drunk, were "raising Hell" and tried "to pick a fight with a watchman" and that he saw trouble was brewing and went to his bunk (R. 129), where he was reprimanded by the Captain.

The Examiner did not consider it of any consequence whether the two firemen had just told the Captain that they were quitting because of Lee, but emphasized the fact that the Captain had no personal knowledge of the true facts and made no effort to confirm the "statements allegedly made to him by the firemen when he seized the occasion publicly to denounce Lee" and appended a note to the

effect that McGuiness admitted that he and Moore had had some drinks on shore, that Lee had not bothered him to join the Union, and that he and Moore had quit for other reasons (R. 808, N.).

That studied misstatement of the testimony of McGuiness can only be appreciated by reading that testimony (R. 379-394).

The Examiner attempted to make it appear that the Captain reprimanded Lee for its effect on the crew. The Captain said that Lee followed him on deck and started the conversations over again (R. 418). Lee admitted that he did go on deck, but claims that it was the Captain who resumed the conversations and "that he was just stamping up and down and foaming at the mouth" (R. 129).

Lee admitted that it was his policy to engage the Captain in conversation in the hearing of the crew to drive "home the Union policy through the Captain" (R. 151). Yet the Examiner rejected Captain Brinker's testimony that Lee initiated conversations with him as "highly improbable" because of "Lee's subordinate position" (R. 810). The character and disposition of Lee is too plainly revealed by his testimony, for anyone who heard it to make such a statement, unless he was seeking reasons to credit his testimony. The difference in rank was not a deterring factor when Shartle argued strenuously with Captain Murray while that officer, in the pilot house, was navigating his vessel into Conneaut, Ohio (R. 201, 202) and still the Examiner took no notice of this incident.

The Examiner put considerable emphasis on the "vile and abusive" language which Lee said the Captain had used. It was the sort of language that Lee himself was accustomed to use as he admitted (R. 144-5). But the Examiner rejected the Captain's denial that he used such language because he admitted that "he might have swore" (R. 808, 9).

Lee testified that the Chief Engineer informed him that a Mr. Zyp "had been aboard and wanted to know why they were carrying me. It seems that Mr. Zyp wanted me fired. He told me that he told the Captain that if they fired me he would go too" (R. 135).

Lee was not discharged as, of course, he would have been if the Respondent had so directed. He was not the sort of man to whom a Chief Engineer would make such a statement or for whom he would venture to threaten a Captain.

But on Lee's improbable hearsay tale, the Examiner found that the Respondent actually "attempted to have Lee discharged for his Union activity," assigning as a reason that Lee's testimony was not denied (R. 811).

b. Ralph Zmrazek, a seaman on the Steamer Morse, testified that Captain Gerlach made certain anti-union statements to him while he and the Captain were alone in the Master's quarters (R. 42, 43). Captain Gerlach denied that he had made the statements attributed to him (R. 306, 307). Without any corroboration of Zmrazek's testimony the Examiner stated "The undersigned credits Zmrazek's testimony, above outlined, rejects the testimony of Gerlach inconsistent therewith, and finds that Gerlach made the statements substantially as attributed to him by Zmrazek" (R. 819, 820).

Robert Vogt was one of the few witnesses who was not an organizer. He was employed first on the Bunson and later on the Cornell. Captain Lawless was successively Master of both vessels. The Captain employed Vogt knowing that he was a member of the Union and took him along when he was transferred to the Cornell (R. 84, 87). Vogt testified to conversations after the election which he said occurred in the pilot house and in which he claimed that the Captain made anti-union statements, particularly in relation to Jews and Negroes. Captain Lawless admitted having talked to Vogt but denied making the statements

attributed to him (R. 467). The Examiner found that Vogt's version was the "more reasonable" and credited it (R. 814-15). It will be observed that Captain Lawless was a direct, responsive and unequivocal witness and the Examiner does not suggest that his testimony was weakened by cross examination.

James Barber, a member of the Union, was a seaman on board the Cornell, who testified for the Respondent concerning Captain Lawless' and Chief Engineer Heckel's strict impartiality on Union matters (R. 563-64). The Examiner made no reference to Barber's testimony which fully corroborated the testimony of the above mentioned officers.

c. The Examiner said that Captain "Lehne's testimony generally was indefinite, evasive, and lacking in conviction. Babin's testimony, on the other hand, supported by convincing detail and unshaken by cross examination, impressed the undersigned as that of a truthful witness" (R. 816-7).

Chief Engineer Hunger, he said, "was confused, contradictory and unreliable" (R. 817).

In fact, Captain Lehne and Chief Engineer Hunger were both unusually direct, responsive and unequivocal witnesses.

An impartial trier of the facts does not indulge in such unwarranted characterizations.

Hunger had ordered Babin out of the engine room where, of course, he had no business to be. The Examiner found that that was done "for the purpose and with the intent of restricting Babin from discussing the Union with members of the crew" (R. 818).

Babin testified that he had to go to the engine room to mark the soundings on the sounding board and to give the Engineer instructions.

Babin was discredited by the undoubted physical fact that the sounding board was on the fantail deck outside

of and abaft the engine room, where, however, it could be observed from the engine room (R. 397), and by the altogether more probable testimony that the instructions to the Engineer were communicated to him from the pilot house, not by the watchman (R. 629-31).

The Examiner said in the text of his report that "as deck watchman it was Babin's duty to sound the ballast tanks and to mark the soundings on a board located inside the engine room door at or near the fantail" and added a footnote that "The fantail is the room in the afterend of the ship where the steering gear is located. It is directly adjacent to the engine room" (R. 817, N. 14).

That was a studied effort to mold the facts to conform to Babin's testimony.

The Examiner quoted Babin's improbable testimony, positively denied by Captain Lehne, that the latter said to him "The Company does not hire any Union men aboard any of their ships" (R. 816).

The fact that every one of the organizers, including Babin, when hired was a union member; that no organizer pretends that he was questioned in any way on the subject (R. 13, 53, 124, 168, 233, 274); that the testimony of Shartle, the only one interrogated as to his prehiring examination, affirmatively shows that he was not questioned in any way on the subject of Union membership (R. 169), and that there is no charge or pretense even that the Respondent had ever discriminated against Union members in hiring, did not deter the Examiner from accepting Babin's testimony as literal truth, but the one concrete reason assigned by him for rejecting Captain Lehne's testimony was that eighteen months afterwards he did not recall the names of the seamen who quit their jobs because of Babin's importunities (R. 816). The fact that Babin, himself, could not remember the names of the men who quit with him after the election or the name of the Mate on whose watch he was on duty from March 22nd

until June 13th (R. 27), did not cause the Examiner to reject any portion of his testimony.

d. The Examiner said that Organizer Weissflog "favorably impressed" him "by his attitude and demeanor on the witness stand and by his over-all testimony" (R. 821, N.), but that Captain Gerlach "was an evasive witness whose over-all testimony, in many respects contradictory and improbable, indicated a paramount desire to conform to what he conceived to be the Respondent's theory of the case" (R. 819, N.).

Can it be that unconsciously the Examiner attributed to the witness his own desire to make the facts conform to what he had decided to find? It is difficult to conceive of an impartial trier of the facts using so many adjectives to give full credence to all the witnesses on one side and to discredit all the witnesses on the other side.

The Examiner said that Weissflog's conversation with Chief Engineer Haller "was substantially undenied" (R. 821), although Haller categorically denied making the statements attributed to him (R. 605-7). He also corroborated Captain Gerlach that the cook requested the latter to get Weissflog out of the galley because he was interfering with the work (R. 606).

He also testified that he himself reprimanded the members of his department who returned late to the ship with Weissflog (R. 607) on the occasion in respect of which the Examiner found that Captain Gerlach had "selected Weissflog alone for reprimand" (R. 820).

However, the Examiner ignored that testimony.

He attempted to break the force of the admitted fact that Captain Gerlach, knowing that Weissflog was a Union organizer, had said to him "When you are off watch and the other men are off watch, you can do as you please," by finding that "on a number of occasions thereafter, Gerlach, openly and in the presence of the crew, displayed his antagonism to Weissflog and subjected him to discrimina-

tory treatment because of his Union activities. The incidents referred to were the reprimand of Weissflog for returning late to the ship and delaying its sailing, his expulsion from the mess hall or galley, which Chief Engineer Haller testified the cook had requested, and his ejection from the firemen's sleeping quarters where, of course, he had no business to be (R. 820-1).

The Examiner completely ignored the testimony of Weissflog that he was on duty at the time of the messroom episode (R. 703); that his regular place of eating was in the dining room and not the messroom and that he had gone from the dining room to the messroom to talk to the men about the Union (R. 704). Instead of adopting this testimony, which would have vindicated the Master's actions the Examiner infers that Weissflog had eaten in the messroom and had talked to the men during the course of the meal (R. 821). To have found that Weissflog came into the messroom while he was on duty, which Weissflog himself admitted, would have constituted clear justification for his ejection. The Examiner could not afford such a break in his own predetermined pattern.

e. Harry Jones was an oiler on the Steamer McGonagle. He testified that the Master of that vessel had met him when he was going ashore and had asked whether he was bound for the Union Hall. Jones told the Captain that it was none of his business where he was bound (R. 225). Jones stated in answer to questions from counsel for the petitioner that he had not paid any attention to the remark (R. 226). Out of this incident, which was obviously of no significance to the seaman involved, the Examiner finds that the remark was an interrogation concerning Jones' Union membership and fits that into a general Company anti-union pattern which he says existed (R. 813).

Captain Wallace of the Steamer Horace Johnson was too ill to be examined at the time of the hearings (R. 792-3). George Anderson, a seaman on that vessel, testified

that Captain Wallace had asked him if the two men who were with him in the Union Hall at Two Harbors, Minnesota, were Union members, followed by a statement to the effect, "They were up to the Union Hall yesterday, weren't they? * * * They must belong to the Union" (R. 253). The Examiner concludes from this testimony that (R. 813):

> "The last quoted remark, it is found, was intended to and had the effect of conveying the impression that the respondent was engaged in surveillance of the Union Hall."

It is undisputed that Two Harbors is a very small town consisting of a single street extending a few blocks on which the Union Hall is located in a store building on the street level. It is also undisputed that all who were in the Hall would be plainly observable by anyone passing by (R. 268). This acknowledged physical situation did not prevent the Examiner from using the remark as the basis for an unfair labor practice finding against the respondent.

Robert Carr was the Third Mate on the Bunson. He conceded that he and the Third Assistant Engineer had had conversations concerning the effect of the rotary hiring system on their own jobs (R. 358), but denied that he had said that the officials and organizers of the N.M.U. were agitators and communists (R. 357). The Examiner refused to credit Carr's denial of the alleged anti-union statements (R. 815). The Examiner virtually conceded that he was prejudging this witness (R. 359).

Despite Organizer Shartle's conceded lie about the winch incident, the Examiner found him "generally credible" (R. 836, N.), but found that Captain Murray was "generally evasive and at times improbable and inconsistent" and "disclosed himself as an unreliable witness" (R. 822, N.), that First Mate Dobson's denial that he discharged Vogel "lacked conviction" (R. 823), and that the "conclusionary assertions" of Mates Dobson and Hewar were "too vague and general to permit appraisal" (R. 835).

We have already sufficiently discussed the discharge of Shartle (*ante* pp. 29-32).

In Summary:

A. The General Course of Conduct.

The Examiner studiously ignored the gap in the petitioner's case by finding in reference to the few sporadic incidents and statements on seven ships relied on to prove the general course of conduct on seventy-three, that "Their coincidence in point of timing with a crucial period of union organization and their occurrence on every ship about which testimony was adduced disclose both a pattern and a design" (R. 827).

The aggravations of an intensive campaign conducted for six weeks on board the ships by organizers like Lee, Babin and Weissflog would have caused more incidents but for the imperative instructions of the Respondent's president.

Naturally there were incidents on every ship about which testimony was adduced. The fact that the Petitioner was unable to adduce any testimony about the other sixty-six ships was ignored. No uniform pattern and design was disclosed even on the seven ships about which testimony was adduced. Lee, Babin and Weissflog were the only organizers who even pretended that their organizing efforts were restrained in any way. These do not establish a pattern for even seven, let alone seventy-three ships.

B. The Ferbert Letters.

They were plainly within the employer's right of free speech.

N. L. R. B. v. Virginia & Electric Power Co., 314 U. S. 469, 477.

So the Petitioner itself deemed it prudent to find. So the Court below, in the instant case, expressly held.

The Petitioner corrected the Examiner's mistake of law but by reversing his syllogism reached the same conclusion of fact.

C. Mr. Ferbert's Instructions.

It was taken for granted during the trial that the instructions were given. No issue of fact was raised on the subject, and the Examiner did not risk a finding that they were not, in fact, given. The instructions had to be disposed of on some ground so the Examiner held that the instructions to their superiors were ineffective unless communicated to the unlicensed seamen.

D. The Discharge of Shartle.

There was not a shred of testimony to contradict or discredit the testimony of Captain Murray and First Mate Dobson that neither knew that Shartle was a Union organizer before he was discharged and that he was discharged because of his conceded incompetence. This, however, was the only coercive act alleged in the petitioner's case. The Examiner considered it so important that he even specified it as a reason for his general finding of a general course of coercive conduct, designed by the respondent, but he prudently added "but also independently thereof."

E. Other Typical Examples.

When the Examiner did not deem it prudent to find a fact asserted by the petitioner, without any evidence to support such a finding, he insinuated that it was probably true, as in the matter of the distribution of the "Jim Crow" pamphlets, discussed later (*infra*, pp. 44-45).

The very adjectives used to justify the absolute credence given to all of the Union organizers, although two of them were convicted of deliberate lies, and to discredit the testimony of the Masters, Mates, Chief Engineers and

Assistant Engineers, even when undisputed, were an integral part of a uniform pattern and studied design disclosed throughout his report.

POINT IV.

THE RESPONDENT MAKES A LABORED EFFORT TO SHOW THAT THE EXAMINER ACTUALLY MADE SOME DECISIONS IN FAVOR OF THE RESPONDENT.

In fact, it could name but three inconsequential rulings favorable to the Respondent. The other alleged favorable rulings are omissions to mention trivial incidents. None of the four basic findings considered under the preceding point is involved in this point.

1. The Winch Incident.

The Examiner did find the fact, overwhelmingly proven, that that incident occurred. He said that Shartle "denied during cross-examination as a Board witness any recollection of this incident" (R. 836).

In fact, he categorically denied that it occurred (R. 192).

Despite Shartle's lack of recollection, and regardless of his positive lie, the Examiner considered him "generally credible" but Captain Lehne was not to be believed because he could not recall the names of sailors who quit the ship eighteen months before (R. 816).

Although he found the fact, as even he was compelled to do, he attempted to minimize it by saying "there is no evidence that at that time it was heightened to the importance which is now reached to it by the Respondent" (R. 836, N.).

Yet Shartle's incompetent handling of the winch might have caused a serious, if not fatal, accident had not the Mate promptly intervened (R. 336).

2. The "Jim Crow" Pamphlet.

The Examiner did not find that the Respondent was responsible for its distribution, but he attempted to create the impression that it probably was responsible therefor and said that "there is evidence that the Union and its organizers did not issue or use that pamphlet as part of its campaign to organize the Respondent's vessels" (R. 803-4). There is no such evidence, as we show below.

Concededly, it was a Union document.

Concededly, it was mailed to the men.

The head of the Respondent's mailing department testified that all the communications to the fleet passed over her desk and positively denied that that document was mailed by herself or any of her assistants (R. 658).

There is not a scintilla of evidence that anyone connected with the Respondent had anything to do with the mailing of the document.

Yet the failure of the Examiner to find that the Respondent was responsible for the distribution of that document is cited to prove his fairness! In fact it was with the utmost reluctance that he made this finding for he stated (R. 804) "there is support for the assertion that the Respondent was responsible for its distribution is to be found in the evidence." There is not one iota of evidentiary support for such an inference.

Although the Examiner did not stultify himself so far as to make such a finding, he did attempt, as the Petitioner attempts in this Court, to suggest the probability that the Respondent did cause the document to be mailed, since the Union prepared it for distribution on the Coasts and did not want it distributed on the Great Lakes because it knew "that Lake Seamen were not ready to accept negroes as equals." In support of that statement, the Petitioner refers to the testimony of the Union organizers (Br. p. 72).

Not one of them testified to any such thing, as a reference to the many citations will disclose. Each said that he did not distribute the pamphlet. Of course, none of them knew, or pretended to know, the policy of the Union.

But the Petitioner had a witness on the stand who did know Union policy,—Vice-President Lawrenson. He was called as an expert on Union policy and recalled at the end of the case, but was not asked a single question on the subject.

The Respondent had no access to the pamphlets. There is no pretense that it had such pamphlets printed.

The natural supposition would be, in the absence of evidence to the contrary, that the same person who caused the distribution of the pamphlet on the Coast also caused it to be mailed to the Lake seamen without realizing how they would react to it. Having found out, the Union or the Petitioner is now attempting to insinuate, even to this Court, that the Respondent had the pamphlet mailed as a part of its anti-Union conduct.

The Petitioner says "there is evidence in the record that the Company *may have been responsible* for the pamphlet reaching the employees" (italics supplied) and it misquotes Captain Brinker as practically saying so (Br. pp. 72-3).

A reference to the citation, R. 427, will disclose that he testified precisely to the contrary.

Of course, the circulation of such a pamphlet did cause a good deal of ship talk for which the Petitioner seeks to hold the Respondent responsible.

3. The Herrick Testimony.

Admittedly, it was pure hearsay and really added nothing to the case. The fact that the Examiner did not accept it is cited as evidence of his fairness!

The Petitioner refers to Herrick as an oiler. Perhaps it overlooked the fact that he was a Union organizer.

4. The Other Rulings Alleged to Show Fairness.

All were omissions to mention trivial incidents. The Examiner had to be selective.

The magnifying of too many trivial incidents into coercive acts would merely have added to the evidence of unfairness.

Finally, the petitioner even cites a decision made by this Examiner in favor of another Great Lakes steamship company as proof of his fairness! The case at bar is not one of personal bias. It is one of predetermination of the issues of this case and the Examiner's rulings in another case can have no possible relevancy.

POINT V.

THE QUESTION, DISCUSSED BY THE PETITIONER UNDER ITS POINT III, WHETHER THE FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, WAS NOT DECIDED BY THE COURT OF APPEALS.

Having reached the conclusion that the decision lacked "all semblance of fair judicial determination," the Court did not find it necessary expressly to decide that question. No doubt it considered a decision on the stated ground alone the more salutary.

We assume that, if the Court should hold that the Court of Appeals exceeded its power, the case will be remanded for a decision of that question.

N. L. R. B. v. Donnelly Garment Co., et al., 330 U. S. 290;

Helvering v. Rankin, 295 U. S. 123, 133.

In Conclusion, we respectfully submit that the judgment of the Court of Appeals should be affirmed.

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